BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	**GEN Docket No. 93-252**
	)	
	)	
Regulatory Treatment of Mobile Services	)	

REPLY COMMENTS OF
THE SOUTHERN COMPANY

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SUMMARY

Consistent with the Southern Company's ("Southern's") position, the vast majority of commenters support a pragmatic approach to the task at hand. They support liberalizing operational and technical rules in the Commercial Mobile Radio Services ("CMRS") where doing so reduces regulatory burdens and enhances flexibility. They oppose new technical burdens which might create the appearance of regulatory parity among different CMRS services but which, in practice, would frustrate the continued development of vibrant services, such as wide-area Specialized Mobile Radio ("SMR"). Southern urges the Commission to heed these views.

To foster vibrant wide-area SMR markets, Southern also reasserts the need for a 140 SMR frequency cap in Metropolitan Statistical Areas. The commenters roundly criticize the Commission's proposal for a gross CMRS spectrum cap. Many, however, recognize that service-specific caps promote the public interest by fostering competition and consumer choice. While the Further Notice of Proposed Rule Making and several of the commenters suggest wide-area SMR service can be equated with cellular service, and presumably the two should be treated as a single market, the facts demonstrate otherwise. Due to

permanent spectrum disparities, entrenched licensing differences, and historically separate customer bases, the wide-area SMR and cellular markets always will be distinct. A spectrum cap targeted at the SMR market, therefore, is essential to prevent individual firms from establishing regional choke-holds in this important nascent industry.

Moreover, the Commission should not be deluded by Nextel, Inc.'s plan to overhaul Part 90's allocation of 800 MHz spectrum. Even if a single wide-area SMR had Commission authority to access the 200 contiguous 800 MHz SMR frequencies, it could not successfully emulate a cellular system. Besides the aforementioned differences between wide-area SMRs and cellular providers, wide-area SMRs face extraordinary congestion in the 800 MHz band. Existing congestion makes "re-tuning" 800 MHz systems to alternate 800 MHz frequencies impossible. Together, the insurmountable differences between wide-area SMR and cellular services preclude the realization of Nextel's ambitions. The only practical effect of implementing Nextel's plan would be to lock out competing wide-area SMR providers. In all events, administrative precedent prohibits consideration of Nextel's grandiose plan in this proceeding.

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The Southern Company ("Southern"), by its attorneys and pursuant to Section 1.415 of the Federal Communication Commission's rules, hereby replies to the Comments filed in response to the Further Notice of Proposed Rule Making ("Further Notice") in the above-captioned proceeding.[1/]

I. INTRODUCTION

1. Southern filed Comments in this proceeding generally supporting the Commission's pragmatic proposals. However, Southern urged the Commission to avoid impractical levelling of the regulatory plane at the expense of competition in different Commercial Mobile Radio Service

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1/ Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GEN Docket 93-252, Further Notice of Proposed Rule Making, FCC 94-100 (released May 20, 1994).

("CMRS") markets.[2/] Southern urged the Commission to be guided by Congress's directive to modify the agency's technical rules only as may be necessary and practical.[3/] In this regard, Southern urged the Commission to recognize the intractable differences between the wide-area Specialized Mobile Radio ("SMR") and cellular service markets, and to craft its regulations accordingly.[4/]

2. Several commenters consider it a foregone conclusion that wide-area SMR and cellular markets are "substantially similar," and they presuppose that the regulations governing the two markets should be as similar as practicable. Such a conclusion, at best, is extremely premature. The latest figures indicate that only one wide-area SMR is operational, and it serves 5,000 customers.[5/] At year-end 1993, cellular providers served 16 million customers nationwide (or 3,200 times the number served by wide-area SMRs), and they were adding 14,000 new subscribers per day.[6/] The relative dearth of data on how customers

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[2/] Southern at 1-2 and 5.

[3/] Southern at 4.

[4/] Southern at 5.

[5/] Comments of Nextel, Inc. at 6.

[6/] Year-end 1993 figures quoted by CTIA.

will perceive wide-area SMR service makes it impossible to conclude today that the service is substantially similar to cellular service.

3. Indeed, the facts available demonstrate the opposite conclusion -- that the wide-area SMR and cellular markets always will be distinct. SMRs must operate on non-contiguous frequencies in a multiple licensee environment, essentially scrapping for every frequency, while cellular providers are comfortable duopolies licensed for 25 MHz blocks of contiguous spectrum. Moreover, there is little basis for a conclusion that cellular and SMR providers will compete for the same customer markets. SMR customers historically have come from an industrial base with unique requirements such as dispatch service for large fleets. Advanced digital technologies will enable SMRs to better serve this market, and to expand into other markets. However, while SMR and cellular services may slightly overlap, the SMR market will continue to be a distinct market unto itself for the foreseeable future.[7/] At this point in time, that there is no real-world basis for a

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[7/] Southern intends to sell excess capacity on its system to traditional dispatch users like state and local governments, utilities, and industrial and commercial users, as well as to others.

determination that the two services are substantially similar.

4. Within this context, Southern continues to urge the Commission to modify operational and technical rules in the CMRS services where doing so reduces regulatory burdens and enhances flexibility. Southern opposes new technical burdens which might create the appearance of regulatory parity among different CMRS markets but which, in practice, would frustrate the continued development of a vibrant wide-area SMR market. Southern also finds support in the Comments for its proposition that the Commission must limit wide-area SMRs to 140 frequencies per Metropolitan Statistical Area. Southern opposes Nextel's anticompetitive proposal to grant a single wide-area SMR authority to aggregate the 200 contiguous channels in the 800 MHz SMR spectrum.

II. DISCUSSION

A. Technical and Operational Rules

5. Several commenters echo Southern's basic philosophy that the Commission should use its discretion to modify CMRS technical and operational rules to give CMRS providers more flexibility so that all providers can develop

vibrant systems.[8/] The commenters also express a general concern that some of the Commission's suggestions go further than is necessary and, if adopted, could adversely affect CMRS providers.[9/] The Commission must not lose sight of its congressional directive to implement only practical and necessary rule changes. In particular, Southern believes the Commission must develop effective, but workable rules governing wide-area SMRs' construction obligations and service territories so that these systems can prosper.

1. The Commission Must Implement Proven Construction Safeguards to Ensure the Use of SMR Spectrum

6. The Commission's proposal to liberalize the construction and loading rules received substantial support

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[8/] See, e.g., AirTouch Paging and Arch Communications Group, Inc. ("AirTouch and Arch") at 4-5. "AirTouch and Arch do not read the legislation as requiring uniformity in all bands in all services, but rather as an expression of Congressional intent to create a level competitive playing field. The focus of the Commission should be on those particular rule disparities that impact competition and which are not technically infeasible."

[9/] See, e.g., U. S. WEST at 6. "[T]he Commission need not and should not overhaul the technical requirements applicable to the various services within the context of this proceeding. Such a task is far too complex to be undertaken within the accelerated time frame in which this proceeding is being conducted." See also Geotek Communications, Inc. ("Geotek") at 7-8.

from the commenters.[10/] More importantly, several of these same commenters, including Southern, urged the Commission to implement adequate safeguards to discourage the warehousing of spectrum. New Par, for example, argues that the elimination of the SMR loading rules requires effective construction rules to promote service to the public and deter spectrum warehousing.[11/] In the paging context, Paging Network suggests a prohibition on the use of extremely low power (i.e., 1 watt) transmitters for purposes of satisfying the Commission's construction requirements.[12/]

7. As Southern suggested in its Comments, the cellular construction rules have proven to be an effective method to promote the use of valuable spectrum. With effective construction rules in place, the Commission need no longer rely on commencement of service as a means of determining actual use of spectrum. However, Southern also agrees with Paging Network that makeshift base stations, or the analogous SMR "base station on wheels," also should be addressed by requiring licensees to implement commercially viable systems.

[10/] See AirTouch and Arch at 5,11 and RAM Mobile Data USA Limited Partnership ("RAM") at 9,10.

[11/] New Par at 11.

[12/] Paging Network at 17.

2. Absent a Specific Proposal, the Commission Cannot Define SMR Service Territories on a Geographical Basis

8. Several commenters support the Commission suggestion that the 800 MHz SMR channel assignment rules could be revised to allow licensing on a geographically defined (e.g., MTA-wide) basis. However, the Commission's proposal to license 800 MHz Enhanced Mobile Service Providers on a geographically defined basis has already received mixed reviews.[13/] Southern voiced its opposition to this concept in its Comments, but takes this opportunity to raise two other significant concerns: (1) due to the lack of available 800 MHz SMR frequencies, there is insufficient spectrum to begin licensing wide-area SMR systems on an MTA basis; and (2) the Commission has failed to provide commenters with any substantive proposal on how it would effectuate geographic licensing. Without a more definite Commission plan of action, it is impossible to ascertain what impact the geographic licensing would have on systems already under construction, such as Southern's. Until the Commission offers a proposal addressing both these

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[13/] See, e.g. E.F. Johnson ("E.F.J.") at 8 (favors self-defined SMR areas), but see the American Mobile Telecommunications Association, Inc. ("AMTA") at 15 (favors MTA licensing).

concerns, 800 MHz SMR licensees must be allowed to continue to establish and operate in self-defined service areas.

3. The Commission Should Not Adopt Revised Part 90 Operational and Technical Rules that Will Hinder the Development of SMR Systems

9. A few commenters support rule changes which Southern strongly believes would unnecessarily burden the wide-area SMR industry. Pittencrieff Communications, Inc. ("PCI") supports imposing the 40/17 dBu cellular protection standard on SMRs.[14/] As Southern commented, existing and developing SMR systems have been carefully engineered and configured on the basis of current rules and procedures. To change these rules now would set back the development of viable SMRs for no particular benefit.[15/]

10. Southern also strongly opposes New Par's suggestion that the Commission should require SMRs to reduce antenna and power limitations.[16/] SMRs do not have exclusive blocks of contiguous spectrum at their disposal like cellular providers. Accordingly, system engineering considerations are different. After-the-fact changes in

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14/ PCI at 8.

15/ Concur Comments of AMTA at 7.

16/ See, New Par at 8.

allowable power levels will adversely affect an SMR's proposed coverage territory.

11. In addition, Southern disagrees with New Par's proposal to extend two Part 22 obligations to Part 90 licensees: (1) a requirement to offer service on a non-discriminatory basis to resellers, and (2) the six-part common carrier test to determine transfer of control.[17/] As mentioned, the characteristics of the SMR and cellular services are very different. To impose additional obligations regarding resale on the fledgling wide-area SMR industry without a thorough understanding of the dynamics of the market is inappropriate. While Southern does not disagree that there should be a common standard for transfer of control, this issue should be examined more thoroughly in a service specific context.

12. Finally, Southern notes that the vast majority of commenters addressing the issue agree that the burden of FCC-mandated interoperability could substantially hinder the development of emerging CMRS systems.[18/]

[17/] New Par at 13-15.

[18/] See, e.g., The Ericsson Corporation at 1-3, RAM at 8-9, and PCI at 10.

B. Licensing Rules and Procedures

13. Southern continues to oppose any changes to licensing rules and procedures which would hinder the further development of wide-area SMRs.

1. The Commission Should Allow Competing Applications or Petitions for New Facilities or Frequencies to Deny to be Filed Against Initial Applications, but Not Against "Internal" System Changes

14. With respect to initial and new application filings, the Comments differed between Part 90 licensees and Part 22 licensees. Part 90 licensees supported the continued use of the first-come, first-served application procedures,[19/] while the Part 22 licensees seemed to prefer the use of application filing windows.[20/] Southern believes that the most equitable resolution of this issue is to allow competing applications to be filed within a 30-day filing window, but only against initial applications to create or to expand one's service territory. This approach contains the licensing scheme of both rule parts and strikes a balance between the diverging viewpoints.

19/ AMTA at 39, RMR at 7, E.F.J. at 23, National Association of Business and Educational Radio, Inc. ("NABER") at 42, and Paging Network, Inc, at 8.

20/ Bell South at 17, Bell Atlantic at 15, GTE at 13-14 and AirTouch at 14-15.

2. The Commission Should Define "Major" Amendment as Any Amendment which Affects the Operations of an Adjacent or Co-channel Licensee

15. Although Section 309(b) of the Communication Act of 1934 requires major amendments to pending common carrier applications to be placed on a 30 day public notice and subject to petitions to deny, many commenters agreed that a more liberalized definition of "major" should be adopted.[21/] The Commission must be reminded that, unlike cellular licensees, SMR licensees must file site-by-site applications for wide-area systems and file for modified licenses each time there is a need to change any technical parameter of a particular station. Hundreds of applications are typically involved in licensing a wide-area SMR system. SMR licensees should be allowed to liberally amend their pending applications without being subject to Section 309(b) requirements.[22/] Accordingly, Southern recommends that the Commission define "major" amendments to applications as those which affect the operations of adjacent or co-channel

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[21/] RAM at 12-13, McCaw Cellular Communications, Inc. ("McCaw") at 36-37, PCIA at 30-31, NABER at 44, SMR Systems, Inc. at 4.

[22/] All non-SMR 800 MHz applications (e.g., Business Radio) must first be coordinated by the designated frequency coordinators. In those instances, it is unlikely that amendments, major or minor, will affect existing operations.

licensees.[23/] Furthermore, only those licensees whose operations are affected by the proposed amendment should be allowed to file petitions to deny.

16. Southern opposes the Comments of Airtouch and Paging Network which propose a strict definition of "major" amendments.[24/] Rather, Southern agrees with Celpage, Network USA, Metrocall, Inc. and RAM Technologies (collectively, "Paging Commenters") that the Commission should minimize creating mutually exclusive situations.[25/] Permitting competing applications to be filed in situations other than the filing of an initial application or an application that affects the operations of others merely fosters frivolous application filings by competitors, as many commenters noted.[26/]

17. Also, a majority of the commenters supported the adoption of the Part 22 procedures which allow mere notification to the FCC when minor modifications are made to

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[23/] Some support for this position can be found in PCC's Comments which recommended that licensees be allowed to consent to potential interference situations to avoid mutual exclusivity. PCC at 18.

[24/] AirTouch and Arch at 15, and Paging Network at 40.

[25/] Paging Commenters at 26-28.

[26/] AMTA at 37, RMR at 6-7, McCaw at 36-37, E.F.J. at 23.

a license where the changes affect only the interior of the licensee's service areas.[27/] Southern supports this position.

3. Assignment and Transfer of Control of CMRS Licenses Should Occur Only After Construction

18. With regard to assignment of stations after construction, Southern finds other commenters support its position that assignment of facilities should occur only after construction.[28/] However, a few commenters sought to allow unconstructed facilities to be included in the transfer or assignment of a license.[29/] Southern opposes this approach because this approach fosters speculative filings and precludes others from applying for needed CMRS spectrum.

[27/] PCI at 13, Geotek at 11-12, PCC at 14, PCIA at 30, E.F.J. at 22, and SMR Systems, Inc. at 6-7. Some commenters suggested that no notification to the FCC be required for minor amendments: PCI at 13, PCIA at 30-31, and Paging Network at 40.

[28/] AMTA at 44 and PCC at 19-20,

[29/] Geotek at 20, GTE at 17, AirTouch and Arch at 13, and Paging Commenters at 28.

4. It is Unfair to Conform the Application Filing Fees for all CMRS Providers

19. With regard to increasing the filing fees for all CMRS providers to $230, only one commenter, CTIA, supported this proposal.[30/] All other commenters opposed increasing the SMR licensing fee or suggested reducing the cellular application fee.[31/] Southern continues to believe that the overall burden of fees on the applicant must be assessed. Because SMR base station facilities are licensed transmitter-by-transmitter, to increase the SMR filing fee to the cellular fee of $230 per application is grossly unfair.

C. Spectrum Aggregation Cap

20. Southern proposes that the Commission adopt a limitation on SMR spectrum of 140 frequencies within a Metropolitan Statistical Area ("MSA") at this time. If in response to the Nextel proposal the Commission determines to

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30/ CTIA at 5. See also, Comments of E.F.J. at 20-21 which supports increasing the filing fee for wide-area SMR systems to $230, but maintaining the $35 fee for local SMR systems.

31/ Nextel at 47-48, RAM at 11-12, McCaw at 34, Bell Atlantic at 15, AirTouch at 5-6, Pagemart, Inc. at 12, Paging Commenters at 25 and PCC at 10. PCC also questions the Commission's authority to increase the filing fees because it is not based on a cost of living increase (at 11-13).

open a docket to consider restructuring SMR spectrum, Southern proposes that the application of this limitation be included within that docket.

21. The Southern proposal is predicated upon the need to preserve competitive options for users seeking enhanced and wide-area dispatch services. Southern notes that several commenters expressed support for service-specific spectrum limitations.[32/] Sprint Corporation summarized the issue as follows:

> The Commission is concerned that without such a cap, a licensee could aggregate sufficient spectrum to exert market power and thereby thwart development of an expanded and diversified CMRS marketplace. The Commission's concerns may be well-founded. Given a limited amount of spectrum it is clear that if a provider can acquire all of the available spectrum in a particular market then that provider can stifle competition. However, it is not clear that there should be one spectrum cap applicable to all commercial mobile services. What is clear is that if a spectrum cap is adopted

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32/ Sprint Corporation ("Sprint") at 2; SBC's Initial Comments at 4; Bell Atlantic Company at 8.

it should apply to services that are substantially similar to each other.[33/]

1. SMR Services Are Distinct From Other CMRS

22. As discussed above, intractable spectrum, licensing, and customer-base differences will distinguish wide-area SMRs from other services for the foreseeable future. Nextel, however, attempts to portray all wireless communications as within a single market:

> Nextel's experience has been that consumers are interested in services and functions; they are indifferent to regulatory categories. Even in the context of traditional SMR operations, consumers select between the full array of presently existing wireless services and, on a month to month basis, constantly migrate from one service to another. We see former cellular and paging subscribers switching to SMR services, and SMR customers moving into cellular and paging networks. This not doubt reflects a seamless continuum of consumer preferences based on

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33/ Sprint at 2.

individual evaluations of price, service and functionality.[34/]

23. Nextel's anecdotal reference to "seeing" customers migrate from one service to another is unreliable. Nextel presents no explanation of the cause of migration. Southern agrees with Nextel that consumers are interested in services and functions. It is for that very reason that a distinct market exists for enhanced, wide-area dispatch services. Although Nextel "sees" migration from one service to another due to changes in the business customer's demand for service and function, this does not demonstrate that the different services and functions are interchangeable, and therefore, broadly define a product market that is relevant to an examination of market power. Nextel's casual portrait of a seamless CMRS market is contradicted by the affidavit of Dr. Jerry Hauseman, who expressed a concern that an across-the-board limitation on spectrum aggregation would inhibit the exploitation of economies of scope which result when common fixed investment is used to produce several different

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[34/] Nextel at 24.

products: "Many CMRS services are different markets . . ."[35/]

24. Southern's proposal that a spectrum limitation be applied to the SMR category is predicated on the separate service and function offered by dispatch and emerging enhanced dispatch providers. Southern's market research has encompassed a broad range of wireless service users and providers. That research demonstrates that telephone company affiliates perceived that the emerging wide-area SMR systems as primarily responsive to customers with combined dispatch and telephone needs. Wide-area SMR providers perceived their service as responsive to two distinct market demands -- cellular telephone service and dispatch-based service, -- both recognized the distinction between customers whose significant needs include dispatch and those whose significant needs do not include dispatch.

25. Nextel's portrayal of the demand for dispatch as indistinct from other mobile wireless services is at odds with the marketplace realities recognized in the FCC

35/ Comments of AirTouch and Arch, Affidavit of Dr. Jerry A. Hauseman, at 15. A service specific spectrum limitation, such as the Southern proposal, would not interfere with economies of scope. Southern's initial Comments demonstrated that economies of scale do not justify the aggregations of spectrum that the Commission is witnessing.

decision that granted it wide-area SMR status.[36/] There, Nextel (formerly known as Fleet Call) recognized the dependence of "police and fire departments, local governments, and other public safety related communications entities" upon dispatch and sought the waivers it obtained in part to bring forward an enhanced service that would provide "a higher level of communications privacy than has been possible in traditional SMR systems."[37/] Nextel also diffused concerns about anticompetitive consequences as follows:

> Commenters' concerns about Fleet Call's SMR service fees and about the availability of other SMR service to those seeking it reflect an assumption that Fleet Call will stifle competition in its markets. We find no basis for this assumption. As for the conversion process itself, Fleet Call states that it can accommodate all existing users during the implementation period, moving them from system to system as required. It has offered as well to assist customers not

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36/ Fleet Call, Inc., 6 FCC Rcd. 1533 (1991).

37/ Id. at 1534 (footnotes omitted).

> wishing its new SMR service to migrate to other SMR systems in the market. . . .[38/]

26. The fact that migration to cellular telephone service was not considered to be a reasonable option indicates the distinct nature of enhanced, wide-area dispatch services. The portrayal of transportation companies, utility companies, public safety agencies, and large fleet organizations as having only a transitory demand for dispatch rather than paging or two-way telephone is simply an unrealistic view of the distinct dispatch-based demand.

27. Moreover, whether the Commission characterizes SMR service (dispatch-based or enhanced, wide-area dispatch) as a market or a sub-market is a choice of language, not substance. "[D]efining a 'submarket' is the equivalent of defining a relevant product market for antitrust purposes." U.S. Anchor MFG, Inc. v. Rule Industries, Inc., 7 F.3d 986, 995 (11th Cir. 1993). The reasonable interchangeability of use or the cross-elasticity of demand between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes. Brown Shoe Co. v.

38/ Id. at 1537 (emphasis added).